1993

# State of Utah v. Joseph C. Valdez : Brief of Appellee

Utah Court of Appeals


Elliott Levine; Summit County Public Defender; attorney for appellant.
Jan Graham, Kenneth A. Bronston; attorneys for appellee.

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, | : | |
| Plaintiff-Appellee, | : | Case No. 930114-CA |
| v. | : | |
| JOSEPH C. VALDEZ, | : | Category No. 2 |
| Defendant-Appellant. | : | |

# BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF TAMPERING WITH EVIDENCE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-510 (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH, THE HONORABLE FRANK G. NOEL, PRESIDING.



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# BRIEF OF APPELLEE

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## JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of tampering with evidence, a second degree felony, in violation of Utah Code Ann. § 76-8-510 (1990), in the Third Judicial District Court in and for Summit County, State of Utah, the Honorable Frank G. Noel, presiding. This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

## STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The sole issue presented in this appeal is:

1. Was there sufficient evidence to prove that defendant, aware that an investigation was in progress or that an official proceeding was imminent, intentionally removed an intoxilyzer test record and checklist from a booking room with the purpose of impairing the investigation or the proceeding? When challenging the jury's verdict, the defendant must show that the evidence and its inferences are so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of

which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983). "[S]o long as some evidence and reasonable inferences support the jury's findings, [the appellate court] will not disturb them. See State v. Booker, 709 P.2d 342, 345 (Utah 1985)." State v. Moore, 802 P.2d 732, 738 (Utah App. 1990). To meet this burden, defendant must marshal all the evidence in support of the verdict and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the verdict. Failure to so marshal the evidence waives an appellant's right to have his claim of insufficiency considered on appeal. Id. at 738-39.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative constitutional provisions, statutes and rules are attached at Addendum A where not set forth in the body of this brief.

## STATEMENT OF THE CASE

Defendant, Joseph C. Valdez, was charged by information with tampering with evidence, a second degree felony, in violation of Utah Code Ann. § 76-8-510 (1990) (Count I), driving a motor vehicle while under the influence of alcohol, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-44 (Supp. 1992) (Count II), driving a motor vehicle while license was suspended or revoked, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-136 (Supp. 1992) (Count III), open container of alcohol in a motor vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-44.20 (Supp. 1992) (Count IV), and use

of a license plate registered to another vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-1a-1305 (Supp. 1992) (Count V) (R. 02-03). Count III was dismissed at the preliminary hearing (R. 11-A).

A jury found defendant guilty on Counts I, II, IV and V (R. 83, 85, 87, 89). At sentencing the second degree felony for tampering with evidence (Count I) was reduced to a third degree felony, and defendant was sentenced to a term of zero to five years in the Utah State Prison on that count (R. 95-96). Defendant was sentenced to terms of six months on Count II and ninety days on both Counts IV and V (R. 96). All terms were ordered to be served concurrently to each other and consecutively to any other sentences defendant was then serving in the Utah State Prison (R. 96).

## STATEMENT OF THE FACTS

On August 16, 1992, Utah Highway Patrolman Paul Brown arrested defendant for driving while under the influence of alcohol (hereinafter "DUI") following defendant's substandard performance on field sobriety tests and booked him into the Summit County Jail (T. 2, 15-23, 27). Obtaining defendant's consent to an intoxilyzer test, Patrolman Brown generated an intoxilyzer checklist (State's Ex. 1) and a test record (State's Ex. 2), which showed, respectively, the test to have been administered in accordance with established procedures and defendant's blood alcohol content to be .185 grams of alcohol, more than twice the legal limit (T. 28-38, 64; State's Ex. 2).

After informing defendant of the results of the test, Patrolman Brown placed the checklist and test record on the booking table, between defendant and him (T. 37-38). A few feet away, seated on the same side of the booking table, Edwin Thacker of the Summit County Sheriff's Office, then on jail duty, took identification information and logged defendant into the computer (T. 71-76). Defendant then asked permission to use the restroom, and Officer Thacker accompanied him to the drunk tank where defendant used the toilet (T. 39, 74-75). Defendant and Officer Thacker returned to the booking area, but seven minutes later, as Officer Brown continued processing the DUI report form and Officer Thacker continued at the computer on the intake process, defendant again asked to use the restroom (T. 40, 75-77).

Officer Thacker again accompanied defendant to the drunk tank (T. 77). Standing about seven feet from defendant, Officer Thacker saw defendant stand directly in front of the toilet with his back to him and engage him in conversation while looking over his left shoulder:

> I observed, while he was looking over his shoulder, his hand was in the position as if he was using the toilet. But then I saw something fall between his legs into the toilet. Some object. At that time, I then went toward him. He noticed that I had started toward him. He pushed the flush button, which is located on the right side and stepped away from the toilet. And I made a dash for the toilet and grabbed the objects that were in the water.

(T. 78).

The objects retrieved, which had been wadded into a

ball, were the checklist and the test record (T. 41-42, 79). Officer Brown confronted defendant about his destruction of evidence in the drunk tank and recorded their exchange, in which defendant stated that he had not been aware of what the "papers" were or that they were important because they had been given to him and he intended to plead guilty anyway (T. 48; State's Ex. 5, R. 22-27).

Defendant testified that he had been convicted of DUI on three previous occasions and that in each case he had been given the results of his intoxilyzer tests (T. 95). In the booking room Officer Thacker gave him cards containing bail information, which were placed in front of him, as though in his own little section (T. 93-94). The "papers," referring to exhibits 1 and 2, were set in front of him by the cards that Officer Thacker had given him, and defendant figured they were his (T. 107-08). Defendant testified that he intended to plead guilty to DUI as soon as he was pulled over. He assumed the papers were a receipt for the intoxilyzer, which he threw in the toilet because they were unimportant to him, not because he intended to "inhibit the DUI charge at all" (T. 96-97).

## SUMMARY OF ARGUMENT

There was sufficient evidence from which the jury could reasonably have inferred that defendant intentionally removed an intoxilyzer checklist and test record from the Summit County booking room, knowing that an official proceeding related to his arrest for DUI was imminent and that such evidence would have to

be available in such a proceeding.

Viewing the evidence in a light most favorable to the jury's verdict, defendant surreptitiously removed the evidence from the area in which he was being booked and attempted to flush it down the toilet. Thereafter he made up excuses that he had intended to plead guilty anyway and that he thought the checklist and test record were merely receipts which he was free to dispose of. Defendant's excuses are undermined by the testimony of two police officers present at the scene, and most particularly by defendant's asking to use the toilet only minutes after having first used it.

Such evidence and its inferences are not so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983). Further, because defendant has failed to marshal all the evidence from which the jury might reasonably have inferred that defendant acted with culpable intent, this Court should decline to consider defendant's appeal on its merits.

## ARGUMENT

### THERE WAS SUFFICIENT EVIDENCE FROM WHICH TO INFER THAT DEFENDANT INTENTIONALLY DISPOSED OF THE CHECKLIST AND TEST RECORD.

On appeal defendant claims that he lacked culpable intent for tampering with evidence because, when he attempted to flush the checklist and test record down the toilet, he did not

believe that they had any significance. In support, defendant apparently argues that (1) he did not contemplate any official proceeding because he intended to plead guilty to DUI in any event, and (2) since these papers had apparently been given to him, he reasonably assumed they were not evidence to be made available in any investigation or proceeding.

In order to successfully challenge the jury's verdict the reviewing court must find that the evidence and its inferences are so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983). In undertaking such review, the appellate court will "view the evidence, along with the reasonable inferences from it, in the light most favorable to the verdict." State v. Moore, 802 P.2d 732, 738 (Utah App. 1990) (citation omitted). "[S]o long as some evidence and reasonable inferences support the jury's findings, [the court] will not disturb them. See State v. Booker, 709 P.2d 342, 345 (Utah 1985)." Ibid.

To meet this burden, defendant must marshal all the evidence in support of the verdict and then demonstrate that even viewing it in the light most favorable to the verdict, the evidence is insufficient. Failure to so marshal the evidence waives an appellant's right to have his claim of insufficiency considered on appeal. Moore, 802 P.2d at 738-39.

In this case there was sufficient evidence, which

defendant has failed to marshal, from which the jury could reasonably have inferred that defendant acted with culpable intent in attempting to flush the checklist and test record down the toilet.

Utah Code Ann. § 76-8-510 (1990) provides, in pertinent part:

> A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:
> (1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation[.]

1. Defendant's Belief Concerning Pending and Imminent Investigations and Official Proceedings.

Upon arriving at the jail Officer Brown established that defendant understood that he had been arrested on DUI (T. 28). At the conclusion of the intoxilyzer test defendant was aware that his blood alcohol content was more than double the legal limit and that the results of the test had been printed out on the test record (T. 37-38, 64, 91). Upon these facts it was clear that not only was defendant already involved in an investigation, but that a prosecution for DUI was about to be instituted. Furthermore, and notwithstanding defendant's protestations that he did not believe that prosecution was imminent because of his alleged intent to plead guilty to DUI, Officer Brown testified that the checklist and test record would have to be offered in evidence at an administrative hearing before the Driver's License Division to establish whether (1)

there had been probable cause for an arrest and (2) there were grounds for suspending defendant's license (T. 66). Defendant would have known these hearings would take place even if he pleaded guilty, a fact the jury could reasonably have inferred from defendant's three prior DUI arrests. Thus, the evidence was sufficient to establish that defendant knew that, regardless of whether or not he pleaded guilty, an official proceeding was about to be instituted, apart from the very investigation then on-going.

2. Defendant's Intent to Make Evidence Unavailable.

Defendant evidently argues that he believed the papers which subsequently turned out to be the checklist and test record had effectively been given to him and, thus, were not in his mind evidence which would have to have been available in any investigation or proceeding. However, there was sufficient evidence from which the jury could have inferred that defendant was perfectly aware that the papers placed near him were not his, but rather significant evidence necessary to prove DUI.

Immediately after the toilet flushing incident, both Officers Brown and Thacker confronted defendant, stating that any papers that had been given to him were taken right back (R. 25-26). At trial Officer Brown testified that since the time the intoxilyzer test had become part of the regular DUI investigation procedure he had not given test results to defendants (R. 51). Even if defendant believed that the checklist and test record had been placed in his "little section," the jury could reasonably

have doubted that he considered them his. The test record is a triplicate form composed of a two thin sheets backed by a thicker third sheet (T. 50; State's Ex. 2). The top sheet bore the original imprint of the intoxilyzer, indicating the results of the test, along with Officer Brown's original handwriting. Officer Brown had not torn out any of the sheets (R. 50). He also confirmed that it would be more difficult to convict a defendant without being able to produce the intoxilyzer test record (R. 70). Thus, defendant would have had the jury believe that the State was surrendering to him all of its documentary evidence attesting to his level of intoxication, significant evidence in either a trial or administrative proceeding, a defense made all the more improbable considering defendant's prior experience with three DUI proceedings.

Defendant also argues that he considered the papers unimportant because he already had made up his mind to plead guilty to DUI. Defendant's prior experience with DUI proceedings, which presumably also consisted of appearances before the Driver's License Division, undermines this claim, as argued above. However, the jury could reasonably have inferred that this claim was specious on the facts of the instant investigation.

When confronted by Officer Brown after the toilet flushing incident, defendant claimed that he had already informed the officer of his intention to plead guilty when he told the officer he had been drinking when first pulled over (R. 24-25).

Officer Brown immediately retorted that defendant's acknowledgment that he had been drinking was not a statement of defendant's intention to plead guilty and that defendant could still plead not guilty (R. 24-25), an outcome borne out by subsequent events. At trial Officer Brown testified that when he spoke to defendant after he had been pulled over, defendant said that he had a few beers and that he had been fishing. It was only after the toilet flushing incident that defendant told him that he was guilty of driving under the influence of alcohol (T. 46).

In sum, the evidence could reasonably have supported an inference that defendant's claim about pleading guilty was merely a sham alibi hastily trotted out to cover his attempt to dispose of the test record and checklist. Indeed, Officer Brown stated that following the incident defendant was no longer cooperative, started playing "mind games," and kept asking to make a deal (T. 60; R. 23).

The most corroborating evidence was defendant's sudden need to again relieve himself, followed by his suspicious disposal of the evidence. When stopped, defendant's van contained sixteen empty beer cans (T. 25). There was clear evidence that defendant had a strong urge to urinate when finally allowed to use the restroom (T. 92). Both Officer Thacker and defendant testified that defendant used the toilet the first time he went to the restroom (T. 75, 105). A mere seven minutes after having relieved himself defendant again asked to use the restroom

(T. 40, 76). Officer Thacker did not recall seeing anything in defendant's hands on the way to the restroom (T. 86). There was no testimony that defendant actually used the toilet. Rather, defendant held his hand as if using the toilet. As defendant engaged Officer Thacker in conversation, while watching the policeman over his shoulder, the wadded evidence fell into the toilet. When defendant noticed Officer Thacker starting toward him, he flushed the toilet (T. 78). From this evidence, characterized as it was by the State's witness, the jury could reasonably have inferred that defendant was deliberately attempting to dispose of evidence he believed was being used in the present investigation or an official proceeding yet to be instituted.

Defendant argues that this Court should find the evidence in this case insufficient, as it did in State v. Harman, 767 P.2d 567 (Utah App. 1989). In Harman, this Court reversed a jury conviction because the evidence demonstrated that, while the defendant disapproved of a certain report, he had nonetheless sent copies of it to other responsible officials. Thus, this Court stated that the "evidence of guilt was so slight, so conflicting, and so inherently improbable that reasonable minds could not have concluded that [defendant tampered with the evidence], rather than rejecting it because it was a 'bad report.'" Id. at 569.

The defense in this case relied exclusively on defendant's testimony. "The jury is not obliged to believe a

defendant's evidence where there is sufficient evidence of guilt presented." State v. Eaton, 701 P.2d 496 (Utah 1985) (per curiam) (holding the defendant's startled response to discovery of his wrongful manipulation of an intoxilyzer which produced results which he then tried to void sufficient evidence of tampering). In contradistinction to both defendant's evidence in this case and the quantum of evidence presented in Harman, the State showed that defendant removed evidence from the booking table and intentionally tried to dispose of it in a surreptitious manner.

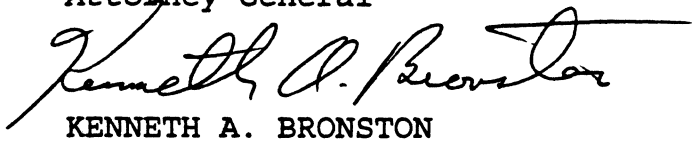
In sum, "[a]ny argument that fair minded jurors could not reasonably believe that the defendant 'concealed or removed' that evidence does not seem to harmonize with ordinary experience and common sense." State v. Helm, 563 P.2d 794 (Utah 1977). Further, because defendant has failed to marshal all the evidence from which the jury might reasonably have inferred that defendant acted with culpable intent, this Court should decline to consider defendant's appeal on its merits.

## CONCLUSION

Based on the foregoing, the State requests that defendant's conviction for tampering with evidence be affirmed.

RESPECTFULLY SUBMITTED this 17th day of August, 1993.

JAN GRAHAM
Attorney General



KENNETH A. BRONSTON
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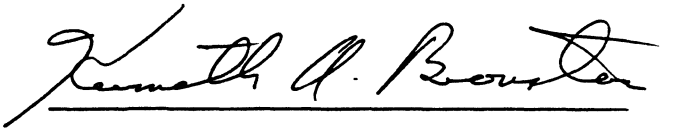
CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed, postage prepaid, to Elliott Levine, Summit County Public Defender, attorney for appellant, P. O. Box 526116, Salt Lake City, Utah 84152-6116, this 17th day of August, 1993.



# ADDENDA

ADDENDUM A

**Utah Code Ann. (1990)**

**76-8-510. Tampering with evidence.**

A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation; or

(2) Makes, presents, or uses anything which he knows to be false with a purpose to deceive a public servant who is or may be engaged in a proceeding or investigation.